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In the

Supreme Court of the United States

MAUNALUA BAY BEACH OHANA 28, a Hawaii Nonprofit Corporation; MAUNALUA BAY BEACH OHANA 29, a Hawaii Nonprofit Corporation; and MAUNALUA BAY BEACH OHANA 38, a Hawaii Nonprofit Corporation, individually and on behalf of all others similarly situated,

Petitioners,

v.

STATE OF HAWAII,

Respondent.

On Petition for Writ of Certiorari to the Intermediate Court of Appeals of the State of Hawaii

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND THE CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

For nearly 120 years, littoral owners in Hawaii held riparian rights to accretion and direct ocean access: their oceanward boundaries moved as beaches accreted and eroded. In 2003, Hawaii adopted a statute--Act 73--that, effective immediately, changed both existing and future oceanfront accretions throughout the state into "public lands." Act 73 fixed oceanfront boundaries forever and, as a result, littoral owners lost both existing accretion and their riparian rights. In 2010, the Hawaii Intermediate Court of Appeals ruled that the State owed just compensation only for accretion that existed in 2003. It also held, however, that the State could take the rights to a shoreline boundary and future accretion because littoral owners' riparian rights were only contingent interests in future accretion and thus were not "property"for takings purposes. That holding directly conflicts with this Court's decisions regarding the nature of riparian rights.

The question presented here is:

> Since this Court has recognized riparian rights are vested property interests, can Hawaii take those rights, including future accretion, without violating federal constitutional protections?

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) and the Cato Institute respectfully submit this brief amicus curiae in support of Petitioner Maunalua Bay Beach Ohana 28, et al.[1]

PLF was founded over 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has participated in numerous cases before this Court both as counsel for parties and as amicus curiae. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts, and represent the views of thousands of supporters nationwide who believe in limited government and property rights.

PLF represented property owners in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). PLF also participated as *amicus curiae* in cases before this Court, including *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 130 S. Ct. 2592 (2010), *Kelo v. City of New London*, 545 U.S. 469 (2005), and *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229

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[1] Pursuant to this Court's Rule 37, all parties have received timely notice of *amici's* intention to file this brief and have consented thereto. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37(6), *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

(1984). PLF attorneys appeared as amicus curiae in both the Hawaii Intermediate Court of Appeals and the Hawaii Supreme Court in support of Petitioners. *Maunalua Bay Beach Ohana 28 v. State of Hawaii*, 222 P.3d 441 (Haw. Ct. App. 2009) (petition for writ of certiorari denied in *Maunalua Bay Beach Ohana 28 v. State of Hawaii*, 2010 Haw. LEXIS 119 (2010)).

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Because of their experience with regard to property rights and, specifically, the constitutional limits on eminent domain, PLF and Cato believe their perspective will aid the Court in considering this petition.

SUMMARY OF ARGUMENT

This case raises serious questions about whether Hawaii has effectively extinguished littoral landowners' rights to accretion, as recognized at common law, and, if so, whether the affected landowners have a federal constitutional claim for relief.

Here, the Hawaii Intermediate Court of Appeals upheld a Hawaii statute (Act 73) as it applies to littoral landowners' rights to *future* accretions. *Maunalua Bay Beach Ohana 28 v. State of Hawaii*, 222 P.3d 441, 464

(Haw. Ct. App. 2009). The Hawaii court distinguished between accreted lands in existence at the time of the Act's passage (which the legislature could not take without compensation) and future accretion of land (which it could). *Id.* at 459-61. In contrast to this Court's decisions and the views expressed by courts in other jurisdictions, the Hawaii court concluded that the right to future accretion was contingent and speculative, and therefore not a vested right whose elimination could support a claim for relief against the state. *Id.*

The petition in this case asks whether, in light of this Court's recognition of littoral rights as unqualifiedly vested property interests entitled to protection, federal constitutional principles prevent Hawaii from extinguishing those rights without notice, without a hearing, and without compensation. Even in the wake of this Court's decision in *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 130 S. Ct. 2592 (2010), the answer is far from clear.

In *Stop the Beach*, petitioner claimed that the Florida Supreme Court's decision upholding a state law providing for the artificial replenishment of beaches,--and the consequent extinction of future accretion rights--departed so drastically from Florida common-law principles of littoral rights that the decision effected a taking. Without answering the question of whether a viable taking claim might exist *if* such a departure from the common law had occurred, this Court held that, because Florida common-law principles had not actually been disturbed, there could be no taking. *Id.* at 2613.

Although no opinion in *Stop the Beach* commanded a majority, six justices, nevertheless

offered their views on the kind of constitutional protection that might be afforded to littoral landowners who are subjected to a sudden break with common-law principles of property rights. Four justices were of the view that such a departure would effect a compensable taking, while two justices were of the view that it would implicate substantive due process rights. *Id.* at 2601-02 (Scalia, J., joined by Roberts, C. J., and Thomas and Alioto, J. J.), 2614 (Kennedy, J., joined by Sotomayer, J.). The remaining two justices expressed no opinion on this issue because they felt it need not be reached to resolve the case. *Id.* at 2618 (Brever, J., joined by Ginsburg, J.). But, again, on the fundamental issue of the existence and nature of a federal constitutional claim *if* a state drastically departs from settled common law principles, the Court's decision unfortunately offered little guidance to states and little assurance to property owners.

This case provides a clearer example of a state's dramatic departure from common-law principles than in others, including *Stop the Beach*. Hawaii's clean break with the state common-law protections for littoral rights is difficult to deny. Thus, this petition offers the Court an opportunity to squarely address the important federal question of the type of claim and remedy victimized property owners might have under these circumstances.

This area of constitutional law is shrouded in confusion, impacting property owners nationwide as emboldened states embrace sudden and drastic changes in common-law principles of property rights. The legal issues at stake here have national implications. Examples of other impacted jurisdictions include Ohio and Oregon, whose landowners have been

grappling with the constitutional implications of threatened and actual departures from settled protections of their rights. For these reasons, the Court should grant the petition.

REASONS FOR GRANTING THE WRIT

I

THE COURT HAS NOT RESOLVED THE QUESTION OF WHETHER STATE DEPARTURES FROM LONG-ESTABLISHED PROPERTY RIGHTS ARE ACTIONABLE UNDER THE U.S. CONSTITUTION

The Fourteenth Amendment to the U.S. Constitution, incorporating the Fifth Amendment's protections, forbids states from taking private property for public use without just compensation. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 242-43 (1897). "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005). But the government may also take private property through acts and decisions that affect property rights and interests. *Id.*

In *Lucas v. S. C. Coastal Council*, 505 U.S. 1003 (1992), this Court held that a regulation depriving an owner of "all economically beneficial use" of his property effects a taking. *Id.* at 1029. The Court discussed how background principles of state law help determine when a taking has occurred. *Id.* According to the Court, an owner is lawfully barred from using land in a way that is traditionally proscribed by "existing rules or understandings," as reflected in state

law. *Id.* at 1030. But if a regulation extinguishes a well-established, permissive use of land, it may effect a compensable taking. *Id.* As discussed more fully below, four justices of this Court recently expressed the view that a judicial decision, as well as legislative and administrative regulations, may effect a taking if that decision drastically departs from traditional and well-established state rules protecting property rights. *Stop the Beach*, 130 S. Ct. at 2601.

The Fourteenth Amendment's Due Process Clause also acts as a barrier against government acts and decisions that take established property rights. As two justices of this Court recently opined with respect to the theory that a judicial decision violates that constitutional provision, "[t]he Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is 'arbitrary and irrational' under the Due Process Clause." *Id.* at 2615 (Kennedy and Sotomayor, JJ., concurring).

In light of these background legal principles and theories, this case raises the question of whether the sudden elimination of well-established, common-law property rights--like Petitioners' right to future accretion--gives rise to a cognizable taking or due process claim under the Fifth and Fourteenth Amendments. The question is significant particularly for those landowners, like Petitioners in Hawaii, whose littoral property rights continue to be at greatest risk of sudden modification or elimination.[2]

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[2] "Littoral" property abuts a sea or lake, while "riparian" property abuts a river. There is no relevant difference between the terms

(continued...)

Generally, "state law defines property interests." *Stop the Beach*, 130 S. Ct. at 2597 (quoting *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998)). This includes littoral rights--the rights of shoreline owners of property directly abutting a lake or sea. *Id.* at 2597-98. For littoral properties, state law defines the nature and extent of owners' rights in navigable waters and the lands underneath them. *Id.* For at least120 years, Hawaii has had well-established common-law rules concerning littoral rights.

Under Hawaii common law before 2003--when Act 73 was enacted--the State owned the land from under the water to the highwater mark, and the littoral landowner owned the land "along the upper reaches of the wash of waves." *In re Ashford*, 440 P.2d 76, 77 (Haw. 1968). As the highwater mark moved, so did the littoral landowner's property line: The owner lost land to erosion, but gained land to accretion, without qualification.[3] *Halstead v.* Gay, 7 Haw. 587, 590 (1889); *County of Hawaii v. Sotomura*, 517 P.2d 57, 61 (Haw. 1973). All the while, direct littoral access to the water would be preserved--advancing an important goal of the erosion-and-accretion doctrine. *State v. Zimring*, 566 P.2d 725, 734 (Haw. 1977) ("[T]he accretion doctrine is founded on the public policy that littoral access should be preserved where possible

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[2] (...continued)
"littoral" and "riparian" in this context. *See* Joseph L. Sax, *Changing Currents: Perspectives on the State of Water Law and Policy in the 21st Century: The Accretion/Avulsion Puzzle: Its Past Revealed, Its Future Proposed*, 23 Tul. Envt'l L. J. 305, 367 n.3 (2010).

[3] Accretion is the process by which the gradual deposit of soil due to the action of tidal waters increases the abutting area of land.

. . . ."). Before Act 73, littoral landowners could formally assert ownership in accreted lands by registering them with the State or bringing a quiet-title action. They had relied on the common law's recognition of the accretion doctrine for *120 years*.

Act 73 suddenly and dramatically up-ended these common-law principles, transferring to the State the benefits of both erosion *and* accretion, without notice, hearing, or compensation to affected littoral owners. Under the Act, not only does the State acquire land through erosion, but it also acquires land through accretion. And, with very limited exceptions, only the State may register or quiet title to accreted lands. The Hawaii Intermediate Court of Appeals held that the law violated federal and state takings and due process protections with respect to accreted lands existing at the time of the law's enactment. But the court upheld the Act with respect to *future accretions*.

The problem with the Hawaii decision is that the distinction between present and future accretions has no support in the state's common or constitutional law, or in this Court's federal constitutional jurisprudence. For example, as this Court made clear in *Cal. ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 284 (1982), "the right to future accretions is an inherent and essential attribute of the littoral or riparian owner." *See also County of St. Clair v. Lovingston*, 90 U.S. 46, 68-69 (1874) ("The riparian right to *future* alluvion is a vested right" and "an inherent and essential attribute of the original property"--a right that is not granted (and therefore rescindable) by the government, but "rest[ing] in the

law of nature;"[4] *United States v. Milner*, 583 F.3d 1174, 1187 (9th Cir. 2009) (citing *County of St. Clair* for the proposition that littoral landowners have "a vested right in the potential gains that accrue from the movement of the boundary line"). As this Court has explained, any rule other than the right of the littoral owner to future accretion "would leave [littoral] owners continually in danger of losing the access to water which is often the most valuable feature of their property, and continually vulnerable to harassing litigation challenging the location of the original water lines." *Hughes v. Washington*, 389 U.S. 290, 293-94 (1967); *see also Ely v. Briley*, 959 S.W.2d 723, 727 (Tex. App. 1998) ("[T]he right to increase by accretion is part of the bundle of riparian property rights . . . ."); Sax, *supra*, at 306 ("[T]he accretion rule accords with our contemporary view that water-adjacency is a primary value of private littoral/riparian titles. . . .").

If Hawaii has in fact eliminated littoral landowners' right to accretion, the unresolved question is whether--and under what theory--affected landowners may have a federal constitutional claim for relief. As alluded to above, this Court's decision in *Stop the Beach suggests* that at least six justices believe that such a claim is available, though on different theories.

Like this case, *Stop the Beach* involved littoral landowners' right to accretion. *Stop the Beach*, 130 S. Ct. 2598. Pursuant to Florida law, a Florida city sought to reclaim privately owned beaches from advancing tides by pouring sand where the beaches had eroded away. Before they eroded, the beaches

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[4] The term "alluvion" and "accretion" are used interchangeably. Black's Law Dictionary (6th ed.) at 77.

were private property; but after the city poured sand to "undo" the erosion, public officials declared the "re-created" beaches to be public, from which beachfront property owners had no right to exclude anyone. *Id.* at 2599-2600.

Property owners challenged the Florida law, which they argued effected a taking. The property owners prevailed in their challenge before the State Court of Appeal, but the Florida Supreme Court overturned that decision and ruled against them. *Id.* at 2600. The owners appealed to this Court, arguing that the Florida Supreme Court, by eliminating important common-law rights and changing the definition of waterfront property, effected a "judicial taking" under the Fifth and Fourteenth Amendments. *Id.* at 2600-01.

While this Court unanimously affirmed the Florida Supreme Court's decision--holding that the state court had not eliminated common-law rights--*id.* 2613--it did not reach the question of the viability of a judicial taking claim. Nevertheless, six of the eight justices who participated in the decision opined as to the kind of constitutional claim that might be available to a property owner who sees his common-law rights extinguished.

Chief Justice Roberts and Justices Scalia, Thomas, and Alito endorsed the plaintiffs' judicial taking theory. *Id.* at 2601 (Scalia, J., writing for the plurality). In their view, the Court's precedents "provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary." *Id.* "[T]he Takings Clause bars *the State* from taking

private property without paying for it, no matter which branch is the instrument of the taking." *Id.* 2602.

Justices Kennedy and Sotomayor agreed that property owners subjected to the sudden elimination of their established property rights have a federal constitutional claim. But they disagreed as to the constitutional theory supporting that claim, concluding that "[i]f a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law." *Id.* at 2614.

Unfortunately, the Court was unable to render a definitive holding in *Stop the Beach* as to the nature of a claim for a state's sudden elimination of long-established property rights--but only because Florida's impact on littoral rights evidently did not rise to a sufficient level of conflict with the state's common law. Here, in contrast, Hawaii has *entirely* stripped *all* littoral property owners of their right to future accretions, producing a conflict with those owners' settled, common-law expectations that is far clearer than the alleged Florida conflict.

II

RESOLVING THE CONSTITUTIONAL IMPLICATIONS OF STATE ABROGATION OF COMMON-LAW PROTECTIONS FOR LITTORAL AND OTHER PROPERTY RIGHTS WILL HAVE A NATIONWIDE IMPACT

The problem of state elimination of common-law property rights--especially by judicial fiat--is not unique to Hawaii. The absence of a federal judicial

takings doctrine has encouraged other state legislatures to restrict property rights--often an unpopular practice--indirectly, by shifting the issue to politically insulated courts. If legislators or their favored interests desire land, they know precisely what to do: avoid changing defined property rights in a way that constitutes a taking and instead wait for the courts to subtly redefine those rights when a property owner inevitably challenges a particular state action. Ilya Shapiro & Trevor Burrus, *Judicial Takings and Scalia's Shifting Sands*, 35 Vt. L. Rev. (forthcoming), *available at* http://ssrn.com/abstract=1652293 (last visited Oct. 8, 2010).

Writing in the Virginia Law Review in 1990, Barton H. Thompson, Jr., authored what is widely recognized as the "seminal article on the judicial takings problem." W. David Sarratt, *Judicial Takings and the Courts Pursued*, 90 Va. L. Rev. 1487, 1494 (2004). Arguing that state courts were too eager, and too able, to take private property without repercussions, Thompson noted that

> [c]ourts have the doctrinal tools to undertake many of the actions that legislatures and executive agencies are constitutionally barred from pursuing under the takings protections--and pressure is mounting for courts to use these tools. Indeed, while paying lip service to stare decisis, the courts on numerous occasions have reshaped property law in ways that sharply constrict previously recognized private interests. Faced by growing environmental, conservationist, and recreational demands, for example, state courts have recently begun

> redefining a variety of property interests to increase public or governmental rights, concomitantly shrinking the sphere of private dominion.

Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1451 (1990).

Sometimes legislatures are successful at recruiting the courts to do their bidding in redefining or eliminating common-law protections of property rights; other times, they are not.

In *State ex rel. Thornton v. Hay*,462 P.2d 671 (Or. 1969), for example, the Oregon Supreme Court entertained a lawsuit from the owner of private dry-sand beach property who sought to enclose his property. *Id.* at 672. The legislature had passed a bill that was a masterpiece of equivocation: It established a "policy" that the state had an exclusive right, through "dedication, prescription, grant or otherwise," to all "ocean shore" property, regardless of private ownership of upland dry-sand areas. Or. Rev. Stat. § 390.610. But fear of taking claims kept the legislature from turning its legislation into an outright binding law, instead characterizing it as a sort of glorified guideline.

In *Thornton*, the state argued that, because of constitutional protections against uncompensated takings, the statute at issue did not actually divest landowners of their property. Instead, it merely "codifie[d] a policy favoring the acquisition by prescription of public recreational easement in beach lands" as authority for the court to restrict the private owners' property rights. *Thornton*, 462 P.2d at 676. In other words, it was a policy that was not quite a law but still should be enforced like a law. The Oregon

Supreme Court exploited this legerdemain, construing the "enacted policy" as a law and effectively absolving the legislature of responsibility for its taking. *Id.* at 678. *Thornton* thus showed that, in the absence of a judicial takings doctrine (or the equivalent under substantive due process or other theory), legislators will use the path of least resistance--the courts--to accomplish policy goals that the Takings Clause would otherwise block.

Oregon again exploited this legislative "loophole" in *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994). In *Stevens*, beachfront owners sought a permit to erect a seawall on their portion of the beach. Using the *Lucas* framework, the Oregon Supreme Court held that the private owners had no property right superior to the public's right of access to the beach. *Id.* at 454. Dissenting from the denial of certiorari, Justice Scalia, joined by Justice O'Connor, recognized that *Lucas* needed to be clarified in order to avoid these "judicial slights-of-hand," Shapiro & Burrus, *supra*: "Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate 'background law'--regardless of whether it is really such--could eliminate property rights." *Stevens*, 510 U.S. at 1334 (Scalia, J., dissenting from denial of cert.).

Landowners in other cases involving similar threats to the judicial elimination of their common-law property rights nervously await their fates. In Ohio, landowners along the shore of Lake Erie sued the State for radically altering settled rules concerning their lakefront property rights. *State ex rel. Merrill v. State*, 2009 Ohio App. LEXIS 3653 (2009). The Ohio Department of Natural Resources for years asserted

that the strip of land along Lake Erie--between the water's edge and the high-water mark—is not private property, as has long been understood by littoral landowners. Instead, the State decreed the strip of land to be part of the public trust--even though there has never has been a public trust in Ohio along the Lake Erie shores! The Department of Natural Resources has gone as far as to charge private landowners who continue to use this land with lease fees.

The landowners prevailed in the trial and appeals courts--which rejected the state agency's calls to redefine well-established littoral rights--and the case is currently pending before the Ohio Supreme Court. Docket No. 2009-1806. Of course, there is no guarantee that the state high court will hold the line against the state agency.

Without definitive guidance from this Court as to the constitutional limits to their ability to redefine--or extinguish--common-law protections of property rights, states like Hawaii, Oregon, Ohio, and others will continue to push the envelope and seek to strip landowners of their rights without consequence. This makes the Court's resolution of questions surrounding the kinds of federal constitutional claims and remedies available to affected property owners all the more pressing.

CONCLUSION

As described above, the Court should grant the petition because it raises important unsettled questions of continuing national import.

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Respectfully submitted,

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